

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,)	
Complainant)	
)	
v.	)	Docket Nos. EL00-95-000
	)	EL00-95-045
Sellers of Energy and Ancillary Services	)	EL00-95-075
into Markets Operated by the California)	
Independent System Operator)	
Corporation and the)	
California Power Exchange,)	
Respondents.)	
	)	EL00-98-000
Investigation of Practices of the	)	EL00-98-042
California Independent System	)	EL00-98-063
Operator and the California Power)	
Exchange)	

CALIFORNIA PARTIES' SUPPLEMENTAL EVIDENCE
OF MARKET MANIPULATION BY SELLERS,
PROPOSED FINDINGS OF FACT, AND
REQUEST FOR REFUNDS AND OTHER RELIEF

March 3, 2003

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction and Overview	2
II. The Commission Has Both the Legal Authority and the Legal Duty to Remedy Rates and Charges that Violate the Federal Power Act Both Before and After October 2, 2000.....	11
A. The Commission Has Authority to Remedy Tariff Violations, Including Both Direct Violations of Express Tariff Provisions and Acts of Bad Faith or Dishonesty Carried Out under the Tariff.....	12
B. The Commission Has Authority to Order Equitable Remedies to Prevent Unjust Enrichment Where Sellers Have Defrauded the Commission and Exercised Market Power	14
III. Proposed Findings of Fact	18
A. Prices in the ISO and PX Spot Markets Were Unjust and Unreasonable.....	18
B. To key degrees, the Five Major California Independent Generators Withheld Capacity From the Market To Drive Up Market Prices.....	20
1. Overview of withholding	21
2. Overview of new testimony and evidence	24
3. False outage withholding	26
4. No-bid withholding.....	31
5. High-bid withholding.....	32
6. Reserve shutdowns during system emergencies	34
7. Other evidence of withholding.....	35
8. The generators' withholding conduct is an exercise of market power and violates the ISO Tariff.....	36
C. Sellers' Bidding Practices During the Relevant Period Reflected a Concerted Effort to Manipulate the Prices in the ISO Real-Time Market	38
D. Sellers Submitted False Load Schedules to the ISO to Increase Scarcity and Prices in the Day-Ahead Market and to Move Load into the More Easily Manipulated Real-Time Market.....	46
E. Sellers Engaged in Megawatt Laundering or Ricochet to Sell Power At Inflated Prices In the Real-Time Market	52
F. Sellers Engaged in Death Star and Other Congestion Games	58
G. Sellers Double Sold Ancillary Services Capacity from the Same Generating Units	61

TABLE OF CONTENTS (cont.)

	<u>Page</u>
H. Sellers Engaged in the Get Shorty Strategy of Selling Non-Existent Ancillary Services to the ISO	63
I. Sellers Engaged in Uninstructed Generation Games	66
J. Sellers Shared Non-Public Generation Outage Information Using Industrial Information Resources, Inc. As An Intermediary.....	69
K. There Was a Significant Level of Collusion and Collective Behavior Among Sellers.....	75
1. Coordination and collusion were accomplished through formal and informal agreements and through a variety of information-sharing channels.....	76
a. Two-Party Agreements -- Generally.....	77
b. Two-Party Agreements -- Profit Sharing.....	79
c. Two-Party Agreements -- Facilitation	80
d. Information Sharing -- Trader Conversations.....	81
e. Information Sharing -- Industry Organizations.....	84
f. Information Sharing -- Proprietary Outage Information.....	87
2. The record is replete with other evidence, not detailed herein, showing collusive behaviors	87
3. The generators and marketers identified in this proceeding are the regulatory equivalent of co-conspirators and should be subject, at a minimum, to the remedies recommended by the California parties	88
L. There Is Evidence that Prices for Emissions Credits Were Manipulated in a Manner Similar to Prices for Natural Gas and Electricity	90
M. Seller Withholding, Not Buyer Underscheduling, Led to Forced Reliance on the Real-Time Market	93
1. Sellers withheld enormous quantities of energy from the day-ahead market in the summer of 2000	93
2. Market monitors found that underscheduling was the result of insufficient supply in the real-time market, not of buyer behavior.....	97
3. Sellers leveraged their withdrawals from the day-ahead market by selling at exorbitant prices in the real-time market.....	99
4. Prices in the PX day-ahead market would have been reasonable if sellers had not withheld power	101

TABLE OF CONTENTS (cont.)

	<u>Page</u>
5. No change in buyer bidding practices could have produced an adequate supply of power in the PX day-ahead market.....	102
N. California Border Material Gas Price Indices Were Manipulated.....	104
IV. The Limited Effectiveness of Oversight and Enforcement Emboldened Sellers to Engage in Manipulative and Anti-Competitive Activities During the Relevant Period	108
V. The Remedy Requested By The California Parties Is Warranted Not Only Because Of The Evidence Presented But Also Because Sellers Have Misled The Commission, Destroyed Documents, and Prevented Discovery	113
A. The Commission Should Draw Negative Inferences from the Sellers’ Deceptive and Misleading Conduct	114
B. The Commission Should Draw Negative Inferences from the Sellers’ Destruction of Evidence.....	128
1. Wanton document destruction	128
2. Negligent document destruction	130
3. The failure to produce information warrants the Commission’s negative inference that such information is adverse	132
C. The Commission Should Draw Negative Inferences from the Sellers’ Prevention of Discovery	133
D. The Commission’s Restrictions Also Have Impeded Effective Discovery	138
VI. The Commission Should Recalculate the Market-Clearing Prices for the Period of May 1, 2000 Through October 1, 2000 Because Pervasive Tariff Violations Resulted in ISO and PX Charges that Were Different From the Filed Rate.....	139
A. The Commission Should Provide a Remedy for the Pervasive Tariff Violations That Will Put Both Buyers and Sellers in the Position That They Would Have Been in if Sellers Had Followed the Tariffs’ Rules	141
1. During the period from May 1, 2000 through October 1, 2000, California consumers were charged at least \$2.374 billion above the rates that would have obtained had sellers not engaged in tariff violations and market manipulation.....	142
2. Given the single-price auction approved for both the ISO and PX Tariffs, the interrelated nature of California’s various electricity and transmission markets, and the pervasive nature of the tariff violations, the Commission must order the ISO and PX to reprice all sales from May 1, 2000 through October 1, 2000 and must order all sellers to disgorge amounts charged above the mitigated market-clearing price	143

TABLE OF CONTENTS (cont.)

	<u>Page</u>
B. The Commission May Require All Sellers to Disgorge Amounts Collected Above the Filed Rate Because All Sellers Agreed to Accept the Single Market-Clearing Prices Established by the ISO and PX Tariffs.....	147
C. It is Vital that the Commission Enforce Its Filed Tariffs and Rules for the Period from May 1, 2000 through June 20, 2001	150
VII. The Commission Should Provide a Remedy for the \$2 Billion In Unjust and Unreasonable Rates that Sellers Charged CERS	153
VIII. The Commission Should Provide a Remedy for \$182 Million In Unjust and Unreasonable Charges that Sellers obtained through Sales of Greater Than twenty-four Hours and through Exchange Transactions	158
IX. Conclusion	161

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,)	
Complainant)	
v.	)	Docket Nos. EL00-95-000
	)	EL00-95-045
Sellers of Energy and Ancillary Services	)	EL00-95-075
into Markets Operated by the California)	
Independent System Operator)	
Corporation and the)	
California Power Exchange,)	
Respondents.)	
	)	EL00-98-000
Investigation of Practices of the	)	EL00-98-042
California Independent System	)	EL00-98-063
Operator and the California Power)	
Exchange)	

**CALIFORNIA PARTIES' SUPPLEMENTAL EVIDENCE
OF MARKET MANIPULATION BY SELLERS,
PROPOSED FINDINGS OF FACT, AND
REQUEST FOR REFUNDS AND OTHER RELIEF**

Pursuant to the Commission's November 20, 2002, Order on Motion for Discovery Order,¹ the People of the State of California, *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company (PG&E), and Southern California Edison Company (Edison) (collectively, the California Parties) hereby submit their supplemental evidence of market manipulation by sellers, proposed findings of fact, and request for refunds and other relief. This filing consists of this pleading, the sworn testimony of nine expert

¹ *San Diego Gas & Elec. Co.*, 101 FERC ¶ 61,186 (2002) (*November 20th Order*).

witnesses, and a total of 348 exhibits, including deposition transcripts,² tapes of trader telephone recordings, e-mails, analyses of California Independent System Operator Corporation (ISO) and California Power Exchange Corporation (PX) data, and other relevant evidence, together with the charts and indices the Commission required.

I. INTRODUCTION AND OVERVIEW

From May 2000 through June 2001, the total cost of electricity needed to serve California was more than \$44 billion.³ This compares to less than \$25 billion total for the years 1998, 1999, and 2002, combined. This extraordinary increase in cost imposed great hardship on the State's citizens and businesses, crippled the State's two largest utilities, and took the State's budget from a multi-billion dollar surplus to a multi-billion dollar deficit, thereby robbing schools, police forces, and many other essential services of needed funds. Ultimately, it caused a life-threatening power crisis that sent the nation's most populous state into rolling blackouts.

As the California Parties explain herein, the cause of this unprecedented crisis is now known. Beginning in the Spring of 2000, market conditions created an environment that was ripe for abuse by sellers, who then drove prices far above competitive levels through a pervasive pattern of market manipulation. This market abuse by sellers -- and the resulting disastrous effects on prices and reliability -- continued until the Commission stopped it, suddenly and permanently, by instituting a region-wide must-offer requirement and price cap just before the Summer of 2001. So complete was the effect of the Commission's regional mitigation rules on seller conduct that, since those rules were instituted, prices have returned, and remained at, pre-

² Due to the limited amount of time available to prepare this pleading following the close of discovery, a few of the deposition transcripts are not yet final. The California Parties will file the final, versions of these transcripts when they become available.

³ This includes only the portion of California located within the California ISO grid.

2000 levels. Even on the hottest days of the summer (with system demand more than 25 percent higher than during rolling blackouts in the winter of 2000), system emergencies have been few and rolling blackouts non-existent.

This pervasive pattern of seller market manipulation, which began in the Spring of 2000 and ended in the spring of 2001, resulted in prices that were in violation of the Federal Power Act (FPA), which requires that all rates be just and reasonable.⁴ It also involved conduct that was in violation of filed tariffs and Commission rules. This conduct thus resulted in the inequitable and unjust enrichment of all sellers in the market.

We know definitively that Enron manipulated the market and violated market rules, as two of its top traders have already pled guilty. As Timothy Belden, Enron's chief West-Coast trader, admitted in his sworn plea agreement:

I and other individuals at Enron agreed to devise and implement a series of fraudulent schemes through these [ISO and PX] markets. We designed the schemes to obtain increased revenue for Enron from wholesale electricity customers and other market participants in the state of California. . . . As a result of these false schedules, we were able to manipulate prices in certain markets, arbitrage price differences between the markets, obtain "congestion management" payments in excess of what we would have received with accurate schedules, and receive prices for electricity above price caps set by the ISO and the Federal Energy Regulatory Commission.⁵

But Enron was not alone. In fact, there was a general perception among sellers that the rules didn't apply -- that market-based pricing meant that anything goes. Based on this view, sellers engaged in conduct that would be shocking in a fully deregulated market -- and that is

⁴ 16 U.S.C. § 824d (a) (2000) (requiring all wholesale electricity and transmission "rates and charges" to be "just and reasonable," and declaring that "any such rate or charge that is not just and reasonable is . . . unlawful").

⁵ Exh. No. CA-229 at 3, Plea Agreement No. CR-02-0313 (N.D. Cal. 2002).

almost incomprehensible in a market for the sale of a product essential to health and safety, a product necessary to the production of virtually all other products, and a product that was placed by law under the pervasive regulatory authority of this Commission.

As shown in the attached testimony, deposition transcripts, e-mails and other evidence, sellers engaged in the following conduct that, taken together, caused the California electricity crisis:

- Withholding of Generation: To varying degrees, the major independent generating companies in California (AES/Williams, Duke, Dynegy, Mirant, and Reliant) engaged in the deliberate and systematic withholding of energy from the market, driving up prices by creating false shortages and scarcity. This withholding took multiple forms. Some of these generators falsely reported to the ISO that generating units were forced out of service for mechanical reasons when the plant's own records show that the plant was capable of normal operation. On over 20 occasions, totaling over 350 hours, generators placed units on "reserve shutdown" -- that is, they simply shut the plant down for what they asserted to be economic reasons when no maintenance was required -- all during times when the ISO had declared a system emergency. Dynegy, Mirant, Reliant, and AES/Williams also withheld by simply not bidding their output into the market even though their plants were fully operational -- again, often during system emergencies. Finally, these generators withheld generation from the market by bidding so high, and so far in excess of their costs, that they deliberately priced themselves out of the market. These withholding strategies -- often involving more than the 1,000 MW of capacity the Commission found shocking in the recent revelations concerning Reliant's withholding -- succeeded in keeping the market in a near-constant state of shortage and the ISO in a near-constant state of panic as it was forced to fight against time to obtain the power needed to keep the lights on. In addition to being naked exercises of market power, these practices violated the ISO Tariff as they involve giving the ISO false outage information, failing to operate generation to relieve system emergencies, and engaging in the anomalous bidding or withholding of generation.
- Bidding to Exercise Market Power. Generators and other suppliers submitted bids into the PX and ISO energy markets the only purpose of which was to exercise market power. This includes so-called "hockey stick" and other bids that increase based on conditions unrelated to the seller's costs. Often, generators and suppliers bid far higher after the ISO declared a system emergency, knowing that the ISO would need all available power and would be willing to pay any price to get it. These exercises of market power were so pervasive that they were the rule among suppliers, not the exception. This conduct not only increased

prices far above competitive levels, but also violated the ISO Tariff, which prohibits generators from acting in a manner that fails to relieve system emergencies, as well as prohibiting anomalous and harmful bidding practices.⁶

- Scheduling of Bogus Load. Suppliers intentionally submitted false load schedules to increase scarcity and prices in the day-ahead market and to move resources into the more easily manipulated real-time markets. The Enron Memos referred to this strategy as Fat Boy or Inc-ing Load and called it the “oldest trick in the book.” The ISO Tariff, however, requires that schedules be balanced and be based on actual “forecast” demand to be served by the schedule, not fictional demand. The evidence indicates strongly that, in addition to Enron, numerous other market participants have pursued this trading strategy, including Sempra, Powerex, Mirant, Dynegy, Reliant, Hafslund Energy, and, among others, the cities of Anaheim, Glendale (in cooperation with Enron), Pasadena and Redding (in apparent cooperation with Enron).
- Ricochet-type Export-Import Games. Generators and power marketers created artificial scarcity and reliability concerns by exporting vast amounts of power out of California on a day-ahead basis, only to import the same power back into California in an attempt to sell at inflated prices into the real-time markets or under Out-of-Market (OOM) agreements with the ISO or the State of California acting through the California Energy Resources Scheduling Division (CERS) of the California Department of Water Resources (CDWR). This export-import strategy, also referred to as Ricochet or “Megawatt Laundering” in the Enron Memos, increased day-ahead market prices, caused significant reliability concerns, forced the ISO and CERS into costly OOM purchases, and facilitated manipulation of the ISO’s real-time markets in an attempt to evade Commission-authorized price caps. The Commission Staff has already determined that this practice is an exercise of market power.⁷ These activities also violated the ISO Tariff as they were premised on a

⁶ Sellers have long attempted to divert attention from their misconduct by alleging that so called “load under-scheduling” by buyers contributed to the higher prices and the market’s dysfunction. The California Parties’ evidence conclusively shows that this “blame the victim” strategy is not only false, but that sellers engineered the issue by causing the underscheduling problem entirely themselves. It was pervasive seller withholding in the PX markets that forced buyers to buy, and the ISO to scramble to find, power at the last minute. Buyers cannot buy, at any price, what sellers refuse to offer. In fact, had buyers offered to pay up to the PX price cap for all of their demand, as the sellers apparently propose, the ISO would still have been short power in real-time during 201 out of 208 emergency hours in the summer of 2000 as a result of seller underoffering, but the cost of electricity to California would have increased by more than \$6.5 billion.

⁷ *August 2002 Initial Staff Report*, Docket PA02-2, slip op. at 94.

false export schedules submitted to evade ISO price caps. Numerous market participants appear to have pursued this trading strategy, including Enron, Powerex, Semptra, Mirant, and Williams. Some sellers, such as Reliant, appear to have undertaken efforts specifically to hide Ricochet transactions. Others -- such as Semptra and Dynegy, Coral and Glendale, and Constellation and Los Angeles Department of Water & Power -- cooperated with the result of making detection more difficult. The implementation of this trading strategy also often required knowing, willing participation from surrounding utilities who provided “parking” services; these participants include Public Service Company of New Mexico, Eugene Water, El Paso Electric, PacifiCorp, and Snohomish, among others. The evidence also shows that Powerex exported California power into Canada during time periods when the ISO operated under emergency conditions, which violated Powerex’s export license.

- Death Star and Other Congestion Games. Numerous market participants pursued Enron-type congestion games, such as circular export-import schedules (Death Star). These trading games resulted in payments for congestion relief by creating fictitious congestion, as well as fictitious counter-flows, without actually moving any power or relieving any congestion. In addition to circular export-import loops, such congestion games included cut export schedules and offsetting ISO-internal schedules. These games resulted in reliability problems, higher zonal prices, and payments for the relief of congestion that both never existed and, consequently, was never relieved. They also were predicated on the submission of counter-flow schedules that the seller never intended to deliver to loads that did not exist, and as such violated the ISO Tariff. Available evidence reveals the entities involved or participating in such congestion games include Enron, Coral, Semptra, Mirant, the Modesto Irrigation District (MID), Duke and Powerex. Apparently willing partners in these congestion games include the Cities of Redding and Glendale, LADWP, and the Northern California Power Agency.
- Double-Selling of Ancillary Service Capacity from ISO-Internal Generation. Analysis of the data obtained in discovery shows that some generators sold reserves, but then failed to keep those reserves unloaded and available for the ISO. That is, generators sold capacity to the ISO for use as reserves and subsequently sold the same capacity into the ISO’s real-time energy market as “uninstructed deviations.” This created reliability problems both because the awarded Ancillary Service capacity was not available to the ISO when needed and because the ISO was forced to deal with excessive uninstructed energy. But as a result of this practice, the generators inappropriately received payments for both (1) the Ancillary Service capacity that they did not keep unloaded and (2) the uninstructed energy produced out of those Ancillary Services commitments. The practice is expressly prohibited by the ISO Tariff (Amendment 13) but the ISO did not begin fully enforcing the rule until

September 10, 2000. During the Summer of 2000, Mirant, Reliant, and Dynegy engaged in substantial amounts of “double-selling.”

- Selling of Non-Existent Ancillary Services. Several sellers increased costs and created reliability problems by selling Ancillary Services from resources that were either already committed to other sales or incapable of providing the Ancillary Services in the day-ahead market, but hiding the non-existence of the services by buying the awarded services back in the hour-ahead market. This practice violates the ISO Tariff because sellers of Ancillary Services within the ISO control area required to identify the resources that will, in fact, provide the Ancillary Services sold and all sellers of Ancillary Services are required to ensure that the capacity is available if needed. Enron tellingly referred to this strategy as Get Shorty (since a “short” sale refers to the sale of a stock, commodity, or service that the seller does not own). Sellers similarly sold and fully repurchased Ancillary Services without any intent to deliver the services they sold, thus increasing costs and degrading reliability. Entities involved in such sale and repurchase of Ancillary Services that either were non-existent or never intended to be delivered were Enron, Sempra, Coral (likely in cooperation with Glendale), MID, Avista, the City of Azusa and Williams.
- Sharing of Non-Public Generation Outage Information. A number of the largest sellers, including Dynegy, Duke, and Williams, purchased a service from a company called Industrial Information Resources, Inc. (IIR). IIR provided to these sellers detailed, non-public information, on a daily basis, regarding their competitors’ planned and on-going generation outages. All of the plant outage information that IIR provided was obtained from the plant personnel of the companies experiencing the outage, some of which were simultaneously receiving information, through IIR, about their competitors’ outages. Sellers would also call IIR with specific questions regarding specific plant outages and IIR would then call plant personnel on their behalf and report back what the plant personnel told them. The sellers receiving and sharing competitor outage information from IIR then used this information in setting prices and making decisions as to where and how much to sell. These sellers engaged in this conduct despite the fact that the ISO Tariff prohibits market participants from reviewing other market participants’ generation outage programs and despite the companies’ own internal rules and guidelines that prohibited any discussion with competitors regarding those companies’ generation outages. This improper sharing of generation outage information resulted in higher prices for energy and Ancillary Services by facilitating market manipulation by sellers and the coordination of their conduct.
- Collusion among sellers. The discovery effort has yielded specific evidence of widespread collusion among many sellers, power marketers and public power entities. Evidence documents that a number of market

participants, including many public power entities, were jointly implementing or facilitating Enron-type trading strategies. In addition to written and verbal agreements providing for joint action, there were a number of information sharing channels, such as trader conversations, industry groups, and information services through which competitive market information was shared.

- Manipulation of NOx Emission Market. Evidence suggests that sellers manipulated the market for NOx emissions in the South Coast Air Quality Management District through a series of wash trades that created the appearance of a dramatic price increase that may have been fabricated. NOx emission costs are often cited by generators as one of the principal cause of the California power crisis. New evidence, however, suggests that Dynegy, together with AES and others, entered into a series of trades of NOx credits in July and August 2000 by which Dynegy would sell a large quantity of credits and then simultaneously buy back a smaller quantity of credits at a higher per credit price. The net effect of the transactions was that virtually no money changed hands, but Dynegy effectively gave to AES and its other counterparties free credits. The trader also resulted in the reporting of a sale at an inflated price, increasing the apparent cost of NOx credits, and, therefore, the apparent marginal cost of electric energy. Additional investigation is needed to determine the full extent and effect of this behavior.

This evidence, while substantial and compelling, is just the tip of the iceberg. As this investigation has shown, there is a snake under almost every rock one turns. But the limitations in this 100-day process have made it impossible to discover the full extent of seller misconduct or to determine each and every wrongdoer or wrongful act.⁸ Our findings here are representative, not exhaustive. And false statements by sellers before Congress, in the PA02-2 investigation, and elsewhere have made the process more difficult.⁹ The California Parties

⁸ For example, as the Commission knows from its Staff investigation in Docket No. PA02-2-000, much of the critical evidence is contained in recordings of trader phone lines. The California Parties were denied access to existing transcripts and notes of such recordings, and due to seller recalcitrance and the limits of time, the California Parties were only able to review a small fraction of the tapes to which the Discovery Master ruled that they were entitled.

⁹ For example, Reliant's representation to the ISO Board on June 28, 2000, its testimony before Congress on September 11, 2000 and on April 11, 2001. and its November 22, 2000 submission to this Commission have all been proven either inaccurate or at minimum, grossly misleading in light of the

(continued)

proposed the 100-day discovery period as a first step to determine whether the evidence developed warranted additional procedures.¹⁰ The evidence of seller market manipulation uncovered in this proceeding, together with the publicly disclosed revelations -- from the Enron pleas to the Reliant settlement -- that have continued to mount, are sufficient to warrant a full remedy. But, if the Commission believes that more evidence is needed, it must institute additional procedures.

As the evidence shows, the wrongful conduct of sellers, taken together, drove prices to extraordinary levels that bore no relationship to market fundamentals or to the prices that would have resulted if applicable tariffs and market rules had been followed. In the single-price auctions run by the ISO and PX, it is not possible to isolate the harmful effects of any one violation or any one bad actor. When sellers withhold supply from the day-ahead market, not only do day-ahead prices increase, but the ISO is required to purchase more reserves. Congestion games not only increase transmission costs, but they also increase zonal energy prices. Withholding of generation by multiple sellers, through multiple withholding strategies, acts jointly to drive up market-clearing prices for energy and Ancillary Service and creates the need for out-of-market (OOM) calls.

Likewise, the panic and chaos created in the ISO and PX bid-based markets by seller withholding and manipulation directly resulted in higher prices for ISO out-of-market purchases. Sellers refused to sell power for only the hour needed and began to demand terms for out-of-

Commission's recent conclusion that Reliant managers deliberately withheld generating capacity to manipulate prices in June 2000.

¹⁰ See, e.g., *Motion for Discovery Order to Implement the August 21st Order from the U.S. Court of Appeals for the 9th Cir. Allowing the Cal. Parties to Adduce Additional Evidence* at 2, filed in Docket Nos. EL00-95-000, *et al.* (Sept. 6, 2002).

market sales of greater than twenty-four hours or arranged more than twenty-four hours in advance; alternatively, sellers demanded extortionate energy exchange ratios. Furthermore, these same manipulative seller strategies served to drive up the price of power bought by the State through CERS after the PX went bankrupt and the ISO was no longer creditworthy. (This is all without considering the impact of these strategies on forward prices, which is beyond the scope of this proceeding, but was a prime motivator for many of the sellers' practices, as the Reliant transcripts released by the Commission show.)

As a result, this conduct cannot be remedied on a piecemeal basis. The only rational and meaningful remedy is one akin, albeit on a broader scale, to that which the Commission already ordered for the October 2, 2000 through June 20, 2001 period. That is, the market-clearing prices for the period from May 1, 2000 through June 20, 2001 must be reset to the level they would have found had the market's rules been obeyed and the markets not been manipulated. This remedy should apply to all spot market sales in the ISO and PX, even if the seller was able to coerce the ISO into out-of-market sales of as much as one month or into energy exchanges rather than sales for cash. It should also apply to all such sales to CERS, as CERS was filling the role originally filled by the PX or responding to sellers' refusals to sell to the ISO. Just as the Commission found in the *July 25th Order*, because all sellers charged excessive rates through the ISO and PX single-price auctions, "it is fair that all those who benefitted from this market also bear responsibility for remedying any potential unlawful transactions that might have occurred in the market."¹¹ Here, too, the conduct was pervasive, systematic, and unjustly enriched all sellers. The California Parties calculate that the amount of such overcharges by sellers exceeds \$7.5 billion, and may be much higher.

¹¹ *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 at 61,513 (2001) (*July 25th Order*).

A just remedy will restore sellers and buyers alike to where they would have been in a properly and lawfully functioning market. The California Parties ask no more and no less.

II. THE COMMISSION HAS BOTH THE LEGAL AUTHORITY AND THE LEGAL DUTY TO REMEDY RATES AND CHARGES THAT VIOLATE THE FEDERAL POWER ACT BOTH BEFORE AND AFTER OCTOBER 2, 2000

The Commission has recognized since November 1, 2000 that it has authority to order refunds for all unjust and unreasonable rates in the California spot markets charged on or after October 2, 2000, whether charged by investor-owned or publicly-owned utilities.¹² The Commission's prior findings, together with the evidence presented herein, plainly establishes that rates were far above just and reasonable levels. This is so for prices in the ISO and PX bid-based spot market, as well as for ISO OOM purchases and exchanges. It is also true for purchases by CERS acting in place of the PX for purposes of day-ahead procurement and in place of the ISO, at times, for OOM purchases. Thus, the Commission's authority to remedy unjust and unreasonable rates charged on or after October 2, 2000 in California's spot markets is firmly established.

It is also clear, under the facts of this case, that the Commission possesses the authority to remedy excessive charges for the period from May 1, 2000 through October 1, 2000. Indeed, in response to the pervasive fraud, the abusive use of market power, the violations of filed tariffs, and the other instances of misconduct by sellers in the California electricity market prior to October 2, 2000, the Commission must order remedies that fully address the harm done to consumers. There are two bases for such relief. First, the Commission may remedy all violations of the ISO and PX Tariffs and of the sellers' market-based rate tariffs as well as other

¹² See, e.g., *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 (2000) (*November 1st Order*); *July 25th Order*.

applicable legal requirements. These tariff violations include both direct violations of express tariff terms as well as any other acts of bad faith and dishonesty. Second, under the facts presented, the Commission may order equitable relief to prevent unjust enrichment by sellers.

A. The Commission Has Authority to Remedy Tariff Violations, Including Both Direct Violations of Express Tariff Provisions and Acts of Bad Faith or Dishonesty Carried Out under the Tariff

As the Commission has recognized, it has the power to order refunds for past periods where the rates charged were contrary to the filed rate.¹³ Remedies based on such tariff violations are not subject to limits on retroactivity.¹⁴ As shown herein, there are numerous instances of direct violations of sellers' market-based rate tariffs and those of the ISO and PX. These must be remedied.

The Commission has broad authority in this regard.¹⁵ Tariff violations are not limited to misapplications of the explicit terms of the rate schedule -- although such violations, in this case, are manifold. Fraud, anticompetitive conspiracies, and other such wrongful conduct are tariff violations as well. The exercise of market power can not be countenanced simply because a rate schedule fails to include the words "no fraud or market manipulation allowed."

¹³ *San Diego Gas & Elec. Co. v. Sellers of Energy*, 102 FERC ¶ 61,164 P 12 (2003) ("the Commission does have remedial authority to address any tariff violations that occurred prior to [October 2, 2000]"); *accord November 1st Order* at 61,381, *citing Appalachian Power Co.*, 23 FERC ¶ 61,032 at 61,088 (1987). The Commission also may order refunds as a remedy to correct legal errors. *November 1st Order* at 61,381; *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order").

¹⁴ *See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (one "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission").

¹⁵ *See July 25th Order*, 96 FERC at 61,507-08 n.40 (recognizing authority to remedy tariff violations but stating that "it has not been demonstrated that any conditions or limitations of sellers' market-based rate tariffs have been violated").

The obligations of honesty in fact and fair dealing are implicit in the ISO and PX Tariffs. The Uniform Commercial Code (UCC)¹⁶ and California law impose the obligation of good faith which, in the case of a “merchant,” means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹⁷ The UCC standard applies to sales of electricity in California¹⁸ and sellers in this case are merchants under the UCC.¹⁹ Moreover, both the ISO and PX Tariffs require that they be governed by, and construed in accordance with, the laws of California.²⁰ Because the obligation of good faith applies to commercial transactions in competitive markets in California, it should apply with the same force to sales under Commission-approved tariffs that incorporate California law.

Indeed, the Ninth Circuit found that anticompetitive price postings by oil companies, as part of a contractual price-setting mechanism, although not barred by the explicit terms of their agreements, would be a breach of the duty of good faith imposed by the UCC (California

¹⁶ UCC § 1-203; Calif. Commercial Code § 1203.

¹⁷ UCC § 2-103(b) (emphasis added); Calif. Commercial Code § 2103(b). *See* Restatement (Second) of Contracts § 205, comment a. (1981) (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness”).

¹⁸ *Puget Sound Energy, Inc., v. Pacific Gas and Electric Co.*, 2002 U.S. Dist. LEXIS 1350 (N.D. CA 2002) (UCC applies to sales and exchanges of electricity under California law); *see also*, *Minnesota Power & Light Co.*, 52 FPC 617 (1974) (UCC standards apply to the interpretation of contracts for the sale of electricity).

¹⁹ UCC § 1-104(1); Calif. Commercial Code § 2104(1). (“‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill”).

²⁰ California Independent System Operator Operating Agreement and Tariff, § 20.7; California Power Exchange Corp., PX Operating Agreement and Tariff § 15.6.

Commercial Code § 1203).²¹ As that case suggests, the obligation of good faith is especially important in the context of prices intended to reflect a competitive market.²²

The tariffs of the ISO and PX are complex and designed to anticipate a number of market scenarios. These circumstances provided unscrupulous sellers with opportunities to achieve and conceal improper price increases through market manipulation. In many cases, sellers violated explicit provisions; however, acts of fraud and gaming that increased prices above competitive levels, even if not violations of express tariff provisions, violated the implied obligations of good faith and fair dealing and are therefore tariff violations in and of themselves.²³

In short, the Commission's authority to remedy tariff violations includes not only express violations of express tariff provisions but also includes all wrongful conduct committed in bad faith by sellers in perpetrating the California power crisis.

B. The Commission Has Authority to Order Equitable Remedies to Prevent Unjust Enrichment Where Sellers Have Defrauded the Commission and Exercised Market Power

Section 309 of the FPA provides the Commission with power to "perform any and all acts," and to issue such rules and orders as it finds "necessary or appropriate" to carry out the provisions of the FPA.²⁴ Thus, in addition to its authority to remedy tariff violations, the Commission has broad authority to order equitable remedies, including disgorgement of unjust

²¹ *Cal. v. Chevron Corp.*, 872 F.2d 1410 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990).

²² *See also, Cal. Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal. 2d 474, 289 P.2d 785 (1955) (duty of good faith applied to contractual right to fix price for sugar beets).

²³ Moreover, sellers' actions also constitute a violation of the obligation -- imposed by the orders granting market-based rate authority -- to file promptly changes in "status." Such status changes include departures from the characteristics relied upon by the Commission in approving market-based pricing -- in this case, the implied characteristic of honesty in market dealings.

²⁴ 16 U.S.C. § 825h (2000).

enrichment, when sellers commit fraud and exercise market power. “[T]he Commission has broad authority to fashion equitable remedies in a variety of settings.”²⁵

Section 205 (a) of the FPA requires that “[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable,” and declares “unlawful” any rate or charge that is not just and reasonable, while Section 205 (b) forbids “undue prejudice or disadvantage” to any customer or group of customers.²⁶ These requirements must be administered by the Commission with due regard for its statutory responsibility to protect consumers.²⁷ Where prices paid to sellers are shown to be excessive as a result of market power, fraud, and other misconduct, the Commission has the power and the duty to set things right.

Both the Commission and the courts interpret FPA Section 309 (and the corresponding Section 16 of the Natural Gas Act (NGA), 15 U.S.C. § 717o (2000)), to confer on the

²⁵ *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1323 (5th Cir. 1993), *quoting Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984). *See also, Mesa Petroleum Co. v. FPC*, 441 F.2d 182, 186 (5th Cir. 1971) (FPC had authority to take corrective actions).

²⁶ 16 U.S.C. §§ 824d (a), (b).

²⁷ The Commission’s duty to consumers is well established. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, (1956) (“the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed is ‘necessary in the public interest.’”); *Maine Public Service Company v. FPC*, 579 F.2d 659, 664 (1st Cir. 1978) (“The primary purpose of this mechanism is to protect consumers from excessive rates and charges -- any protection received by a utility is incidental”). *See also, FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972) (interpreting parallel sections of the NGA and holding that the NGA “granted FPC broad powers ‘to protect consumers against exploitation at the hands of natural gas companies’” and that Congress meant to create a system that would leave “no ‘gaps’ for private interests to subvert the public welfare”) (internal quotations and citations omitted); *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 (1996) (interpreting parallel sections of the NGA and holding that the “overriding purpose” of the NGA “is ‘to protect consumers against exploitation at the hands of natural gas companies’”) (internal quotations and citations omitted), *cert. denied*, 520 U.S. 1224 (1997).

Commission the authority to require refunds where a seller has collected charges in excess of the just and reasonable level, either by error or through the exercise of market power. For example, in Order No. 637-A the Commission addressed the issue of its ability to remedy the possible abuse of market power by sellers in short-term natural gas release transactions.²⁸ Rejecting a call to make such sales subject to refund, the Commission stated that it could exercise its equitable power under Section 16 of the NGA:

[A]n across-the-board refund condition is not necessary because, should the Commission determine in an individual case that a releasing shipper has abused its market power, the Commission has the authority under Section 16 of the NGA to take appropriate remedial action that can include remedies to prevent unjust enrichment.²⁹

Courts have long recognized the broad scope of the Commission's equitable authority to "set things right" when acting within the scope of its responsibilities. In *Niagara Mohawk Power Corporation v. FPC*, the court considered a Federal Power Commission (FPC) order addressing the failure of a utility to apply for licenses before constructing dams.³⁰ The FPC issued the licenses but backdated them, thereby effectively requiring the utility to pay license fees for the period during which it should have had licenses, but did not.³¹ The D. C. Circuit upheld the order:

The case presents no question of Congressional power, but only a question of construction of the scope of administrative discretion entrusted to respondent Commission under the [Federal

²⁸ *Regulation of Natural Gas Transmission Services and Regulation of Interstate Natural Gas Transportation Services*, FERC Stats. & Regs. ¶ 31,099 (2000) (Order No. 637-A), *generally aff'd*, *Interstate Natural Gas Assn. v. FERC*, 285 F.3d 18 (D.C. Cir. 2001).

²⁹ *Id.* at 31,572.

³⁰ 379 F.2d 153 (D.C. Cir. 1967).

³¹ *Id.* at 155.

Power] Act. The Commission's authority to establish effective dates of licenses earlier than the date of issuance, while not expressly set forth in the Act, is fairly implied, assuming reasonable exercise of the authority. The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.³²

Subsequent cases have confirmed the Commission's power to take equitable action to restore the status quo and to prevent unjust enrichment. In *Mesa Petroleum Company v. FPC*, the Court of Appeals upheld an FPC order that required a gas supplier to "return" to a purchaser the difference between what the purchaser would have paid under its contract with the supplier and the amounts it actually had to pay for replacement gas when the supplier abandoned the contract without Commission approval.³³ And in *Louisiana Public Service Commission v. FERC*, the D.C. Circuit again noted that "[t]he Commission's authority to order refunds of amounts improperly collected in violation of the filed rate derives from FPA § 309."³⁴ The California electricity crisis and the fraud and market manipulation by sellers are unlike anything ever seen by the Commission or its predecessor. As shown by the evidence produced herein, the misconduct of sellers deserves a comprehensive remedy. The Commission's previous approval of sellers' market-based rates should not -- and as shown herein does not -- give sellers

³² *Id.* at 158 (emphasis added).

³³ 441 F.2d at 186.

³⁴ 174 F.3d 218, 224 n.6 (D.C. Cir. 1999) (internal citations omitted); *see also*, *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (agency cannot impose penalty, but is not otherwise limited in devising a remedy to restore the status quo ante); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d at 109 (the "Commission has broad authority to fashion remedies so as to do equity consistent with the public interest"); *Cox v. FERC*, 581 F.2d 449, 451 (5th Cir. 1978) (upholding remedy requiring that seller return a volume of gas to the interstate market equal to the volume it had diverted to intrastate sales).

the right to commit fraud or to wantonly exercise market power. Otherwise sellers will benefit from their own egregious conduct.³⁵ It is, rather, by requiring sellers to return amounts that they were never entitled to charge that the Commission can enforce the filed rate doctrine.

The Commission has authority under Section 309 of the FPA to order equitable relief to set things right in the California markets for periods before October 2, 2000. This authority is in addition to the Commission's authority to remedy tariff violations. The facts presented here demand that the Commission exercise all of its authority to provide a full remedy for the egregious conduct of sellers and the previously unimaginable harm that was inflicted on buyers.

³⁵ The Supreme Court has reserved judgment on the question of whether the filed-rate doctrine applies in the case of fraudulent conduct. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 583 n.13 ("We save for another day the question of whether the filed rate doctrine applies in the face of fraudulent conduct"); *Montana-Dakota*, 341 U.S. at 253 ("We need not decide what action the Commission is empowered to take if it believes that a fraud has been committed on itself").

Public Version -- Confidential Information Removed

Material Redacted

III. CONCLUSION

The framers of the original Federal Power Act would not be surprised to have seen prices rise to five to ten times their ordinary levels due to market power and manipulation of power prices, for they had lived through periods in which the market power of utilities was not controlled by federal or state regulatory statutes. Perhaps due to this legislation and the Commission's success in enforcing it, no Commission since has been confronted with a market power and manipulation episode, and period of high prices and huge wealth transfers, anywhere near the size of the Western power crisis of 2000-2001.

With only 100 days to conduct discovery, the strategic recalcitrance of the targets of this inquiry, and mountains of data to sort through, the California Parties have unearthed far more than enough factual information to warrant Commission action. Even where the Commission finds individual facts or numbers open to interpretation, it is inconceivable that it can now ignore a pattern of unprecedented, unjust, and unreasonable prices and a pervasive, widespread, and amply documented pattern of behavior by many sellers that runs counter to market efficiency and transparency.

Public Version -- Confidential Information Removed

Armed with these facts, the Commission has an obligation under its enabling statute to assure that prices are just and reasonable and that sellers have not been unjustly enriched. Any other legal interpretation of its responsibilities, however elegantly crafted, makes a mockery of the Act itself. If the Federal Power Act was not enacted to prevent crises such as those experienced by California and the surrounding states, and to remedy the terrible effects when a crisis occurs, then what strength and validity can it possibly have?

Respectfully submitted,

/s/ Richard L. Roberts
Richard L. Roberts
Samuel T. Perkins
Joseph E. Stubbs
Catherine M. Giovannoni
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ Michael D. Mackness
Michael D. Mackness
Southern California Edison Company
2244 Walnut Grove Avenue
Rosemead, CA 91770

Attorneys for
SOUTHERN CALIFORNIA EDISON
Company

/s/ Kermit Kubitz
Joshua Bar-Lev
Mark D. Patrizio
Kermit R Kubitz
Pacific Gas and Electric Company
77 Beale Street, B30A
Post Office Box 7442
San Francisco, CA 94120

Attorneys for the
PACIFIC GAS AND ELECTRIC
Company

Public Version -- Confidential Information Removed

/s/ Sidney L. Mannheim

Erik N. Saltmarsh, Chief Counsel
Sidney Mannheim, Senior Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814

Attorneys for the
CALIFORNIA ELECTRICITY OVERSIGHT
BOARD

/s/ Sean H. Gallagher

Gary M. Cohen
Arocles Aguilar
Sean H. Gallagher
Traci Bone
Public Utilities Commission of the State
of California
505 Van Ness Avenue, Room 5035
San Francisco, CA 94102

Attorneys for the
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

/s/ Vickie P. Whitney

Bill Lockyer
Attorney General of the State of California
Peter Siggins
Chief Deputy Attorney General
Tom Greene
Senior Assistant Attorney General
Vickie P. Whitney
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 95814

/s/ Kevin J. McKeon

Kevin J. McKeon
Lillian s. Harris
Craig R. Burgraff
Malatesta Hawke & McKeon LLP
Harrisburg Energy Center
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17101

Attorneys for the
PEOPLE OF THE STATE OF CALIFORNIA,
EX REL., BILL LOCKYER

Dated: March 3, 2003



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 445-8194
Facsimile: (916) 327-6833
E-Mail: Vickie.Whitney@doj.ca.gov

March 3, 2003

VIA ELECTRONIC FILING

Honorable Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

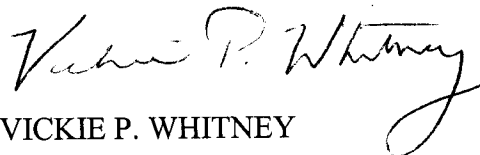
RE: San Diego Gas and Electric Company v. Sellers of Energy
FERC Docket Nos. EL00-95 and EL00-98

Dear Secretary Salas:

Enclosed please find the California Parties' Motion to Publicly Disclose All Exhibits
Filed in the 100 Day Proceeding.

Please call if you have any questions. Thank you for your attention to this matter.

Sincerely,


VICKIE P. WHITNEY

For BILL LOCKYER
Attorney General

VPW:ab
Enclosure
cc: ListServ and Service Lists
Compiled in these proceedings

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

San Diego Gas & Electric Company,	)	Docket Nos.	EL00-95-000
Complainant,	)		EL00-95-045
	)		EL00-95-075
v.)		
)		
Sellers of Energy and Ancillary Services into)		
Markets Operated by the California)		
Independent System Operator Corporation and)		
the California Power Exchange,)		
Respondents.)		
	)		EL00-98-000
Investigation of Practices of the California	)		EL00-98-042
Independent System Operator and the	)		EL00-98-063
California Power Exchange)		
)		

**CALIFORNIA PARTIES' MOTION TO PUBLICLY DISCLOSE ALL EXHIBITS
FILED IN THE 100 DAY PROCEEDING**

In accordance with Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.212 (2002), the California Parties, collectively, the People of the State of California *ex rel.* Bill Lockyer, Attorney General ("Attorney General"), the California Electricity Oversight Board ("EOB"), the California Public Utilities Commission ("CPUC") and Southern California Edison Company ("Edison")¹, respectfully request that the Commission make public all exhibits filed in the 100 Day Proceeding on March 3, 2003 and those to be filed on March 20, 2003.

¹ Pacific Gas and Electric Company ("PG&E") takes no position on making the filing public at this time but understands that the Commission may make this information public after having time to review the evidence.

The public interest requires that all evidence in the 100 Day Proceeding concerning the manipulation of the California markets should be made available for public review. The importance of this proceeding to California's citizens cannot be overstated. Umbrella protective orders of the type in place here are designed to facilitate discovery, during the designated discovery period, by avoiding disputes over release of alleged commercially sensitive information. Now that the discovery period the Commission permitted is concluded, the evidence gleaned from discovery that is being filed with the Commission in the form of exhibits should be publicly available. The California Parties know of no legitimate claim that could credibly be advanced to justify refusal to disclose publicly the exhibits contained in the evidentiary submissions that are being made in this case. The information in question dates back to January 2000, over three years ago – if the concern is competitive harm, it is difficult to imagine that any of this information could cause it – it is very stale. Even if there were a basis for protecting the information that might be colorable under other circumstances, the balance here weighs in favor of disclosure. The public has a right to know the truth about what caused the California energy crisis. This information cannot be kept under wraps any longer.²

² Indeed, in *PEPCO Energy Co.*, the Commission found that a system that fails to provide information to customers, even if such information is provided to the Commission, fails to comport with the requirements of open government. The Commission said, “providing the data only to the Commission, and to no others (including customers) would not be a satisfactory resolution. Commission evaluation of rates . . . based on data known only to the utility charging the rates . . . and the Commission . . . and **not** to the customer who is being charged the rates . . . would hardly comport with the core purposes of FOIA.” 88 FERC ¶ 61,330 at 62,019 n.13 (1999) (emphasis in original.)

BACKGROUND

The filing of additional testimony and evidence of market manipulation by the California Parties (“100 Day Filing”) marks an important milestone in a journey that has to date, lasted nearly three years. The complaint filed by San Diego Gas & Electric Company on August 2, 2000, seeking Commission action to abate the abnormally increasing prices in California’s electricity market, triggered an “informal investigation” and a series of Commission orders,³ the majority of which are now on appeal in the Ninth Circuit. Over the course of the Commission’s orders up through the July 25 Order commencing the refund proceeding, the Commission concluded that it lacked the evidence necessary to file that any seller in the California markets manipulated the markets or violated tariffs. No discovery had ever been allowed to occur on these issues, however, and no evidentiary hearing was permitted – the Commission asserted that, “a trial-type hearing is not necessary to resolve the matters.”⁴

The July 25th Order, as modified on December 19, 2001, instituted and governed a proceeding designed solely to arrive at refunds for the charging of unjust and unreasonable rates charged in California, pursuant to the Commission’s preordained refund formula. While discovery was allowed to proceed in that narrow context and an evidentiary hearing permitted, the scope was strictly limited to the application of the methodology directed by the Commission, and nothing more.

³ These orders include, but are not limited to: *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000) (August 23rd Order); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 (2000) (November 1st Order); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,294 (2000) (December 15th Order); *San Diego Gas & Elec. Co.*, 94 FERC ¶ 61,245 (2001) (March 9th Order); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,115 (2001) (April 26th Order); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418 (2001) (June 19th Order); *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) (July 25th Order); *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 (2001) (December 19th Order).

⁴ November 1st Order, 93 FERC at 61,373.

It was not until February 13, 2002, in response to requests from Congress, that the Commission directed a Staff fact-finding investigation into whether any entity manipulated short-term prices in electric energy or natural gas markets in the West in a manner that impacted long-term contracts.⁵ On May 6, 2002, the Commission posted the now-infamous Enron memoranda that describe in great detail the market manipulation games engaged in by Enron and other sellers, in a deliberate attempt to increase wholesale power prices in California for their own profit. Data requests by the Staff apparently yielded further evidence, all of which is not fully known due to the nonpublic nature of the Staff investigation, that other and further market games were being played during critical periods of California's energy crisis.

On the basis of the limited information that began to come to light, on June 5, 2002, the California Parties filed a motion with the Ninth Circuit under Section 313(b) of the Federal Power Act ("FPA") for leave to adduce additional evidence before the Commission regarding sellers' market manipulation. The Ninth Circuit was persuaded that indeed, as had been pointed out by the California Parties, the "investigation" by the Commission had fallen short and that the parties should be permitted to obtain further evidence of market manipulation.⁶ In fact, in order to grant the California Parties' Section 313(b) motion, the Ninth Circuit had to find that the evidence that the California Parties sought to adduce was the sort of evidence that – had it been available at the time the Commission issued its orders – would clearly have persuaded or compelled the

⁵ Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13th Order), Docket No. PA02-2.

⁶ California Public Utilities Commission v. Federal Energy Regulatory Commission, 9th Circuit Case No. 01-71051, et al. (consolidated cases), (9th Cir. August 21, 2002.)

Commission to reach different decisions concerning the scope of and methodology for establishing refunds.⁷ The manner in which new evidence would be adduced was left to the Commission.

Consequently, on September 6, 2002, the California Parties filed a motion for discovery to implement the 9th Circuit's Order.⁸ On November 20, 2002, the Commission issued an Order on Motion for Discovery Order, granting the California Parties 100 days in which to conduct discovery for a period covering back to January 1, 2000, and to file additional evidence and findings of fact procured.⁹ The Honorable H. Peter Young was appointed the Discovery Master and, as in all cases, a protective order (the same one that governed the refund proceeding before Judge Birchman) was adopted for use in the 100 Day Proceeding.¹⁰

The California Parties request that the Commission set aside the protective order so that all of the exhibits filed by the California Parties and all other parties in the 100

⁷ In *Rocky Mountain Power Company v. FPC*, 409 F.2d 1122, 1128, n. 21 (D.C. Cir. 1969), the D.C. Circuit explained that in order to persuade a court, pursuant to section 313(b) of the FPA, to allow a party to adduce new evidence, the party must show that it "clearly appear[s] that the new evidence would compel or persuade to a contrary result." (citing, *Louisville Gas & Elec. Co. v. FPC*, 129 F.2d 126, 134 (6th Cir. 1942), cert. denied, 318 U.S. 761 (1942), reh'g denied, 318 U.S. 800 (1942)).

⁸ The California Parties asked for three things: (1) to conduct discovery to obtain evidence of market manipulation by sellers; (2) that the Commission appoint an ALJ as Discovery Master; and (3) that they file, after the 100 days of discovery, additional evidence found along with recommendations concerning the need for additional procedures.

⁹ 101 FERC ¶ 61,186.

¹⁰ *San Diego Gas & Electric Co., et al.*, Order of Chief Judge Adopting Protective Order, Docket Nos. EL00-95 & EL00-98 (August 7, 2001); *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 63,035 (2001) (Order Modifying Protective Order (September 6, 2001); *San Diego Gas & Electric Co., et al.*, Order Regarding Protective Order in Discovery Master Proceedings, Docket Nos. EL00-95 & EL00-98 (December 2, 2002) ("Protective Order").

Day Proceeding on March 3, 2003 and March 20, 2003, will be made public.¹¹ Given the extreme public importance of the information uncovered, the protective order should not shield those who have engaged in unlawful, manipulative, anticompetitive and injurious conduct. The truth should be laid bare for all to see, most especially given the health, safety, and welfare consequences endured by California's citizens as a result of such conduct.¹²

**THE CONTENT OF THE EVIDENCE UPON WHICH THIS COMMISSION
WILL ACT MUST BE MADE PUBLIC**

There is indeed a great public interest in administrative proceedings such as the one now pending before this Commission, since it is the public who are most impacted. As the Supreme Court has stated, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”¹³ The Commission itself has long been attuned to the need for public access to its processes – the need for “sunshine” in decision making – and has been loath to keep important information secret absent a truly compelling need to deny public access. In

¹¹ The Protective Order prescribes a procedure for contesting a producing party's designation of materials as “protected materials,” and generally contemplates a process under which the Presiding Judge will decide whether materials should remain protected. Protective Order, P 11. However, the Protective Order also provides that any party may ask the *Commission* to find that the Protective Order should not apply to *all or any materials* previously designated as Protected Materials pursuant to the Protective Order. *Id.* at P 14. The California Parties are invoking this latter provision of the Protective Order concerning materials produced in the 100 Days Proceeding and used in the Exhibits filed with the Commission because of the exigency and importance of this issue and because the discovery period has now ended so that the matter is now before the Commission, not Judge Birchman or Judge Young.

¹² The California Parties would also point the Commission to a letter sent to Chairman Pat Wood by California Senator Dianne Feinstein on February 6, 2003, also asking the Commission to lift the protective order.

¹³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

proceedings before this agency, it has been recognized that, “the public sector is not present; it is only tangentially represented by the interventions of State regulatory and environmental bodies, and, therefore, the public can only apprehend the nature and conduct of an agency’s adjudicatory process through the information made available by the agency to the public.”¹⁴ Consequently, “*in camera* reviews and determinations at regulatory agencies such as this Commission are antithetical to the paramount desideratum of the public’s right to know not merely what *was the judgment* of the ultimate decisional body, but more importantly, *what was the content of the evidence* upon which it reached that judgment.”¹⁵

The principles outlined above are the very principles that should guide the Commission here in setting aside the protective order as to the 100 Day Proceeding. There can be no clearer case where the public has the right to know. California’s citizens need to know the truth – they cannot find satisfaction simply in a final decision by the Commission – they should and must know the evidence upon which the Commission ultimately reaches its decision.

The Commission’s guideline for lifting protective orders is found in *Transcontinental Gas Pipe Line Corporation*, 40 FERC ¶ 61,023 (1987). There, the Commission stated that it does not promote closed administrative proceedings.¹⁶ Especially in the case of umbrella protective orders of the type at issue here – where there has never been a decision by the Commission or a Presiding Judge that particular

¹⁴ *Southern California Edison and San Diego Gas and Electric Company*, 49 FERC ¶ 63,029 at 65,127 (1989)

¹⁵ *Id.* (emphasis in original).

¹⁶ *Id.* at 61,066.

materials subject to the protective order are worthy of secret treatment – it should not be presumed that all (or even any) materials designated by a producing party as protected will remain hidden from the public view once they become the focus of testimony, evidence, and Commission decision making. If documents do not qualify as confidential or commercially sensitive, then either the protective order should be dissolved or all of the documents that cannot qualify as deserving of protection should be removed from the scope of the order.¹⁷ The California Parties believe, and ask the Commission to find, that none of the materials that are being filed as evidence in this proceeding merit protection from public disclosure.

In cases concerning the lifting of protective orders, the Commission has balanced competitive harm against the public interest.¹⁸ Where the potential harm in disclosure is minimal (such as where it is stale through the passage of time), the information has been deemed to lose its commercial sensitivity and thus, the public's right to know has won out.¹⁹

First and foremost, while the California Parties recognize that there is validity in some situations to protecting one party from benefiting from the business secrets of another, the balance here weighs heavily in favor of disclosure. The right and need of the public to know is paramount. Those whose conduct is revealed in the 100 Day

¹⁷ *Id.*

¹⁸ *Buckeye Pipe Line Company*, 44 FERC ¶ 61,066 (1988); *Panhandle Eastern Pipe Line Company*, 44 FERC ¶ 61,246 (1988); *Transcontinental Gas Pipe Line Corporation*, 40 FERC ¶ 61,023 (1987); *see also*, *Southern California Edison and San Diego Gas and Electric Company*, 49 FERC ¶ 63,029 (1989); and *Columbia Gas Transmission Corporation*, 20 FERC ¶ 61,047 (1982).

¹⁹ *See, Panhandle Eastern Pipe Line Company*, 44 FERC ¶ 61,246 at 61,917 (1988).

Proceeding as unlawful, fraudulent and manipulative, should be forced to face the scrutiny of those they injured – the public.

Second, the information at issue here is *not* competitively sensitive. The time period covered by this 100 Day Proceeding is January 1, 2000 through June 20, 2001. Information that is 2 ½ to 3 years old is stale and no longer has any competitive value²⁰, particularly in an industry in which historical business practices already have changed dramatically during that same time period – in part because of the energy crisis and the admitted manipulative seller behavior that caused it. This is buttressed by the fact that similar data for the most recent portion of the time period (October 2, 2000 through June 20, 2001), has *already* been made subject to public disclosure because all evidence filed in the underlying Refund Proceeding went into the record without a protected designation, and thus is available for the public to see. There is no basis for treating similar information that is from a time period that is even more remote any differently.

Third, some of the information that is being presented (or information like it, in the case of the notorious Enron memoranda) is already in the public realm. Countless newspapers, radio, and television reports have provided accounts of unscrupulous tactics employed by Enron and others in manipulating California's electric and gas markets, all for profit. In addition, information such as heat rates of generating units, mitigated market clearing prices, and NOx emissions costs have already been publicized as a result

²⁰ *Id.*

of the lifting of the protective order in the Refund Proceeding. Clearly, information that is already in the public domain cannot be subject to a protective order.²¹

Fourth, umbrella-type protective orders such as the one here, serve as an administrative convenience, primarily designed to facilitate discovery. In *Southern California Edison and San Diego Gas and Electric Company*,²² ALJ Lewnes discusses the Commission's utilization of the protective order process to expedite discovery and to avoid a cumbersome and time-consuming process of assessing each individual piece of information for isolated determinations on protection. Given the very limited amount of time afforded the California Parties here, it was imperative to expedite discovery – hence the protective order. Now, however, continuing to keep “secret” the types of information at issue, would not serve any purpose save permitting wrongdoers to shield themselves from public scrutiny and embarrassment. To prevent disclosure of commercially sensitive information is one thing – it is quite another to prevent disclosure of information that is not competitively sensitive merely because of a preference that the public not know the nature and extent of impermissible manipulation. There is no justification – either legally or morally – for preventing those affected by such conduct from knowing the truth.

²¹ The California Parties note in this regard that, because most of the sellers in the 100 day Proceeding marked most of their data productions as “protected,” and because those materials have been incorporated into exhibits that contain evidence that already is in the public domain or is otherwise undeserving of protected status, the California Parties have been forced to designate all of the Exhibits they are filing on March 3, 2003, and even the indices that summarize those exhibits, as “protected.”

²² 49 FERC ¶ 63,029 at 65,126.

CONCLUSION

Unquestionably, the citizens and businesses of California suffered great harm during 2000 and 2001 – we now know why. The reasons for rolling blackouts, massive increases in the prices of electricity, the financial collapse of two major utilities, and the substantial impact to California’s budget must not be available to only a select few. The public’s right to know outweighs any other considerations here and warrants that all Exhibits be made public.

Respectfully submitted,

Vickie P. Whitney

Bill Lockyer
Attorney General of the State of California
Peter Siggins
Chief Deputy Attorney General
Thomas Green
Senior Assistant Attorney General
Vickie P. Whitney, Deputy Attorney General
1300 I Street, Suite 125
Sacramento, California 95814

Kevin J. McKeon

Kevin J. McKeon, Esq.
Lillian S. Harris, Esq.
Craig R. Burgraff, Esq.
Malatesta Hawke & McKeon LLP
Harrisburg Energy Center
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17101

Counsel for the People of the State of California
ex rel. Bill Lockyer, Attorney General

Sidney Mannheim

Erik N. Saltmarsh, Chief Counsel
Sidney Mannheim, Senior Staff Counsel
California Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, California 95814
(916) 322-8601

Attorneys for the California Electricity
Oversight Board

Sean H. Gallagher

Gary M. Cohen
Arocles Aguilar
Sean H. Gallagher
Public Utilities Commission of the State of
California
505 Van Ness Avenue, Rm. 5035
San Francisco, California 94102
(415) 703-2059

Attorneys for the Public Utilities Commission
of The State of California

Richard L. Roberts

Richard L. Roberts
Catherine M. Giovannoni
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Michael D. Mackness
Southern California Edison Company
2244 Walnut Grove Avenue
Rosemead, California 91770

Attorneys for Southern California Edison
Company

Dated: March 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Harrisburg, Pennsylvania, this 3rd day of March, 2003.

Kevin J. McKeon

Kevin J. McKeon
Malatesta Hawke & McKeon
100 N. Tenth Street
Harrisburg, PA 17101
(717) 236-1300